Supreme Court, U.S.
FILED

MAY 3 2002

No. 02-873

In The

Supreme Court of the United States

HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims; MRS. HARRY D. HOSKINS, III Individually and as Representative of A Class of Formosan Termite Victims,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court below erred in ruling that under the Federal Tort Claims Act, prescription began to run, even though plaintiff had not even a hint that he was a tort victim, much less the identity of the tortfeasor; and made this ruling despite it being in direct conflict with prior decisions of the Ninth Circuit (Simmons v. U.S., 805 F.2d 1363 (9th Cir. 1986)), the D.C. Circuit (Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984)), and itself (Ware v. United States, 626 F.2d 1278 (5th Cir. 1980));

Whether the court below erred in failing to apply the discovery rule for commencing running of the period of prescription to the Federal Tort Claims Act (FTCA) and acknowledging it only as applying to the Federal Employers' Liability Act;

Whether, under the FTCA, the notice which must be present, to commence the running of prescription, is an awareness of sufficient facts to identify a particular cause of action;

Whether, in the absence of anything giving rise to suspicion of a tortious cause of damage, a victim has the legal duty to investigate cause; and

Whether, when claims of a class existed prior to 1966, its members are still required to first go through administrative adjudication?

LIST OF PARTIES

Harry D. Hoskins, III
Individually and as
representative of that
class of Formosan Termite
victims sustaining damages
prior to 1966
Mrs. Harry D. Hoskins, III

Plaintiffs

United States of America

Defendant

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The court of appeals' opinion (per curiam, Higginbotham, Wiener and Barksdale) affirming the district court grant of summary judgment (Appendix A) is not published. The order of the court of appeals denying rehearing (Appendix B) is unpublished The district court's opinion (per Berrigan, D.J.) granting defendant's summary judgment (Appendix C) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 21, 2001, and denied rehearing on February 5, 2002. Petitioners invoke this Court's jurisdiction under 29 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2671 *et seq.* (Federal Tort Claims Act)

STATEMENT OF THE CASE

1. After World War II, the U.S. transported on ships into New Orleans war equipment and related items from the Far East infested with Formosan Termites. Over time, the U.S., despite knowing of this Formosan Termite presence and its transfer to the public, spread infested objects out into Orleans Parish and other vulnerable areas of Louisiana, transferred such items to third-parties, and moved infected materials from one to another of its various facilities and other locations in the continental United States. The result was widespread infestation, with resulting damage to private and public property.

The U.S. warned no one and took no significant actions to minimize the damage which resulted from its conduct, despite warnings and alerts from the entomological community over the years..

2. The result of this conduct was that plaintiffs - among many others - suffered substantial Formosan Termite damage to a real property wooden structure, as did all members of the class.

3. The infested World War II materials were initially stored at U.S. Army Camp Leroy Johnson in New Orleans and began spreading out from that location shortly after being brought there in 1945. The inescapable conclusion is that this infestation had spread throughout the New Orleans and surrounding areas/States prior to the effective date of the 1966 amendment to the Federal Tort Claims Act.

Thus, significant class member claims arose prior to the requirement of an exhaustion of administrative remedies as a prerequisite for class joinder.

4. Even though it knew this damage was occurring, the United States continued to spread infested material throughout the country and has never engaged in meaningful

damage control.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, Fifth Circuit's judgment is contrary to decisions of the Ninth and District of Columbia Circuits, as well as one previously made by the Fifth Circuit itself, concerning the type of notice required to commence of the running of prescription, which decisions were that a plaintiff must know facts giving notice of the particular cause of action at issue, not just any cause of action; and that there is no duty to investigate the existence of a cause in the absence of information commonly known or self-evident which gives rise to suspicion.

A critical piece of evidence from below is the Statement of Undisputed Facts offered by applicant Harry D. Hoskins, III as part of opposition to the motion for summary judgment, with two of its entries being the following:

> 9. Mr. Hoskins did not know of any connection between FORMOSAN termites and the damage to his property, and the US government. until he learned of such just before he filed his claim.
>
> 10. Mr. Hoskins could not have learned of such through diligent inquiry, because the average person perceives FORMOSAN termites as an act of nature, having no connection to the US government.

I. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CONTRARY TO DECISIONS BY THE NINTH AND DISTRICT OF COLUMBIA CIRCUITS, AS WELL AS ONE IT PREVIOUSLY MADE.

The Fifth Circuit decision herein below in two ways

creates a Circuit contradiction in interpretation of important principles. First, it limits the Dubose v. Kansas City S. Ry. Co., 729 F.2d 1026 (5th Cir. 1984) application of the discovery rule to wrongful-death cases involving an occupational disease brought under the Federal Employers' Liability Act and refuses to apply it to the Federal Tort Claims Act (FTCA); however, the discovery rule has no such limitation on application and very definitely applies to the FTCA. United States v. Kubrick, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed. 1282 (1949).

This limitation is contrary to the Ninth Circuit decision in Simmons v. U.S., 805 F.2d 1363 (9th Circ. 1986), where the rule was applied to an FTCA claim of wrongful sexual victimization by an Indian health service counselor, where realization of injury did not arise within two years of the conduct but rather was delayed until a psychiatrist informed the victim that the counselor's conduct had caused her injury. Likewise, it is contrary to decision of the U.S. Court of Appeals, D.C. Circuit, in Hobson v. Wilson, 737 F.2d 1 (D.C.Cir. 1984), an FTCA case wherein it was ruled that the "notice" which must be present to commence tolling is "an awareness of sufficient facts to identify a particular cause of action," with the court stating:

> While the precise standard for notice that amounts to constructive discovery and triggers the statute of limitations is not precisely delineated, for our purposes the contours are sufficiently clear. For one, the plaintiff must know facts giving notice of the particular cause of action at issue, not of just any cause of action.
>
> .....
>
> Second, plaintiff's knowledge of the

> grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant.[1]

Likewise, the Fifth Circuit's decision herein contradicts that court's prior ruling in Ware v. United States, 626 F.2d 1278 (5th Circ. 1980), wherein plaintiff's cattle were killed after a Department of Agriculture failure to diagnose tuberculosis, and prescription under the FTCA was ruled not to have commenced running until plaintiff obtained knowledge of the diagnosis failure.

Plaintiff Ware had no reason to suspect the TB diagnosis as erroneous and so was ruled to have no obligation to investigate the cause. TB was thought by him to come from nature, and the obligation to investigate did not arise until he was informed of the government's diagnosis failure. At that point, his obligation to investigate commenced, and prescription began to run.

However, herein the Fifth Circuit imposed the obligation to investigate, despite the absence of anything at all giving rise to suspicion.

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[1]Hobson v. Wilson, 737 F.2d 1, 35, 36 (CCA D.C. 1984); emphasis added. At bar, the Hoskins did not know they had been injured by a legal person of any identity or type but rather believed that Formosan Termites were an element of nature with presence in no way caused by any human-related entity.

As per entries 9 and 10 of the Statement of Undisputed Facts (quoted on page 2 above) entered in opposition to respondent's motion, movers knew nothing of the connection of the U.S. government to the Formosan termites' presence, nor could they have learned of same, because the average person views this pest as an act of nature, unconnected to the government.

Had any reason whatsoever been present for the Hoskins to suspect any cause other than Mother Nature for the presence of Formosan termites, then a duty of investigation would have arisen; however, no generally known clues existed which indicated that over fifty years before, actions by the U.S. Government were responsible for the termites' presence. Thus, in accordance with the prior ruling of the Fifth Circuit, plus those of the Ninth and District of Columbia Circuits, due to the absence of grounds for suspicion, the duty to investigate did not arise, and the running of the prescriptive period did not commence.

II. WHEN CLAIMS OF A CLASS CAME INTO EXISTENCE BEFORE 1966, MEMBERS MAY BE REPRESENTED WITHOUT FIRST GOING THROUGH ADMINISTRATIVE ADJUDICATION.

The Courts below refused to allow certification of Harry Hoskins as a representative of the class of those citizens who sustained termite damages, ruling that exhaustion of administrative remedies was a prerequisite for each member of the class; however, although correct if the claims herein had all arisen after 1966, they did not so arise, and this proceeding is entitled to class action certification.

In summary judgments, all reasonable inferences are

considering that at Camp Leroy Johnson in New Orleans massive amounts of termite-infested military equipment was left to fester immediately after World War II, it is reasonable to infer that the FORMOSAN termites spread throughout the New Orleans metropolitan area during the twenty years which elapsed prior to the effective date of the 1966 FTCA amendment. Consequently, there were class members located in that area who suffered termite damage prior to 1966, and so they possessed their claims for termite infestation and damage prior to the effective date of the 1966 amendment. They could not sue on their claims, because the federal government's responsibility was unknown to the public; however, had they known, they could have sued individually or brought a class action directly in United States District Court, without making precursor administrative claims.

Many of the potential claimants sustained damages within the first twenty years of infestation, and thus their claims were subject to assertion prior to 1966 and the efficacy of the 1966 FTCA amendment relied upon by the Courts below; therefore, they are qualified to be members of the class without first filing administratively.

CONCLUSION

THEREFORE, Petitioners Harry D. Hoskins, III and Mrs. Harry D. Hoskins, III, Individually and as Representative of A Class of Formosan Termite Victims, request of this Court that it GRANT a writ of certiorari to the United States Court for the Fifth Circuit.

Respectfully submitted:

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED NOVEMBER 21, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.01-30428
Summary Calendar

HARRY D. HOSKINS, III, Individually and as representative of the class of Formosan termite victims; MRS. HARRY D. HOSKINS, III, Individually and as representative of the class of Formosan termite victims,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA; ET AL.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(00-CV-1713-C)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:[3]

Mr. and Mrs. Hoskins ("Appellants") appeal the district court's summary judgment in favor of the government on their claims raised under the Federal Tort Claims Act (FTCA) , 28 U.S.C. § 2671 et sec. In reviewing a grant of summary judgment, we apply the same standard as does the district court. Deas v. River West, L.P., 152 F.3d 471, 475 (5th Cir. 1998).

Appellants argue that the district court erred in granting summary judgment before adequate discovery had been conducted. Appellants did not file a motion in the district court seeking a continuance on the summary-judgment hearing based on inadequate discovery. Therefore, there can be no such error on the part of the district court.

Appellants further argue that the district court erred

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[3]Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

in determining that their negligence-based claims were time barred. They contend that their claims did not accrue until they discovered that the government had caused the introduction of Formosan termites into the New Orleans area. The FTCA provides that "[a] tort claim against the united States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented. " See 28 U.S.C. § 2401 (b) Federal law determines when a claim "accrues" under the FTCA. Quinton v. United States, 304 F.2d 234, 235 (5th Cir.1962). Appellants' accrual argument is premised on our pronouncement that "[T]he discovery rule [] should be applied in federal cases whenever a plaintiff is not aware of and has [had] no reasonable opportunity to discover the critical facts of his injury and its cause." DuBose v. Kansas City S. Ry. Co., 729 F.2d 1026, 1030 (5th Cir. 1984). DuBose, however, was a wrongful-death action involving an occupational disease and was brought under the Federal Employers' Liability Act, not the FTCA. 729 F.2d at 1028. We have yet to hold that the "discovery rule" applies to an FTCA claim in
a context similar to this case. Even if we had, however, the discovery rule would not apply unless Appellants could establish that they were unaware of, and had no reasonable opportunity to discover, the critical facts of their injury and its cause. See id. at 1030. This they could not do.

Appellants misconstrue the district court's ruling. That court did not determine that the publication of several newspaper articles on Formosan termites put the public, and thus Appellants, on "notice" that the united states caused

their injuries. The district court was merely acknowledging that the alleged source of the injury was discoverable in the exercise of due diligence.
Similarly, the court did not create an obligation for Formosan termite victims to seek out information at the public library. It was merely pointing out that Appellants had a reasonable opportunity to discover critical facts about the cause of their injuries but failed to do so.

Appellants have not established that the district court erred in its determination that the critical facts were reasonably discoverable.

Appellants also argue that the district court erred in dismissing other claims of potential class members that allegedly arose prior to the enactment of the FTCA. The court concluded that even if there were potential plaintiffs who might have learned of Formosan termite damage prior to the FTCA's enactment, their claims would be subject to the two-year statute of limitations that existed prior to the enactment of the FTCA, so those claims too would be time barred.

Appellants do not address the reasoning of the district court1 in this regard, much less make a coherent legal argument that the district court's ultimate conclusion of time bar was error. Thus, they have waived this argument on appeal. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). To the extent Appellants argue that the limitations period has not yet commenced because those other potential plaintiffs have yet to receive "public notice," we do not consider their argument because it was raised for the first time in their reply brief. See Taita Chem. Co.. Ltd.

v. Westlake Styrene Corp., 246 F.3d 377, 384 n.9 (5th Cir. 2001) (stating that the appellant could not preserve error on claims through a reply brief) .

Appellants also have failed to raise on appeal, and have therefore waived review of, the district court's dismissal of Mrs. Hoskins's claims for failure to exhaust and the court's dismissal of Mr. Hoskins's claims grounded on intentional tort, strict liability, and breach of fiduciary duty. See Yohey. 985 F.2d at 224-25.

This appeal is without arguable merit and is thus frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983) . As such, it is DISMISSED. See 5TH CIR. R. 42.2.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING REHEARING DATED FEBRUARY 5, 2002

FOR THE FIFTH CIRCUIT

No. 01-30428

HARRY D. HOSKINS, III, Individually and as representative of the class of Formosan termite victims; MRS. HARRY D. HOSKINS, III, Individually and as representative of the class of Formosan termite victims

Plaintiff - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

- - - - - - - - - - - - - - - - - -

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

- - - - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
United States Circuit Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED MARCH 29, 2001 AND ENTERED MARCH 30, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MR. AND MRS. HARRY D. HOSKINS, Ill, ETC.	CIVIL ACTION
VERSUS	NUMBER: 00-1713
UNITED STATES OF AMERICA, ET AL.	SECTION: "C" 5

J U D G M E N T

In accordance with the court's order and reasons filed February 20, 2001,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant United States of America and against plaintiffs Mr. and Mrs. Harry D. Hoskins, III, etc., dismissing plaintiffs' complaint against said defendant with prejudice.

Considering the Court having granted the motion by the State of Louisiana to dismiss, accordingly;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgement in favor of defendant State of Louisiana and against plaintiffs Mr. and Mrs. Harry

D. Hoskins, Ill, etc., dismissing plaintiffs' complaint against said defendant without prejudice.

New Orleans, Louisiana, this 29th day of March 2001.

/s/ Helen G. Berrigan
HELEN G .BERRIGAN
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
MAR 30 2001

Supreme Court, U.S.
FILED
MAY 3 2002

No. 03-873

IN THE

Supreme Court of the United States

HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims; MRS. HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED FEBRUARY 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 00-1713

SECTION "C" (5)

MR. AND MRS. HARRY D. HOSKINS, III
INDIVIDUALLY AND AS REPRESENTATIVES
OF THE CLASS OF FORMOSAN TERMITE VICTIMS

versus

UNITED STATES OF AMERICA and
STATE OF LOUISIANA

ORDER AND REASONS

Before the Court is the Motion of the United States to Dismiss, or in the alternative for Summary Judgment. (Rec. Doc. 19). Because Defendant has relied on material outside of the record in support of its motion, the Court shall treat the motion as one for summary judgment. After reviewing the record, the arguments of counsel and the applicable law, IT IS ORDERED THAT the Motion for Summary Judgment is HEREBY GRANTED.

Appendix

A district court can grant a motion for summary judgment only when the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Cop, v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56 (c)). When considering a motion for summary judgment, the district court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). The court must find "[a] factual dispute . . . [to be] 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . . [and a] fact . . . [to be] 'material' if it might affect the outcome of the suit under the governing substantive law." *Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing *Celotex*, 477 U.S. at 322-24, and Fed. R. Civ. P. 56(e)). The mere argued existence of a factual dispute will not defeat an otherwise properly supported motion. *See Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted).

Appendix

Plaintiffs lawsuit alleges that the United States negligently allowed Formosan termites to enter this country, and was negligent in its failure to warn people about the risk of harm from the termites. Plaintiff also asserts liability against the federal government on the basis of breach of fiduciary duty, intentional tort, and strict liability. The United States maintains that Plaintiff's claims are time-barred, and that the claims of the other named Plaintiff, Mrs. Hoskins, and the as-of-yet unascertained class members must fail for lack of exhaustion. Furthermore, the United States insists that pursuant to the government's limited waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), § 2671 *et seq.*, it may not be held liable in strict liability or for the commission of an intentional tort. Plaintiff maintains that the statute of limitations should be tolled because of his difficulty in ascertaining the involvement of the federal government in the tortious conduct described in the complaint, or, in the alternative, that the statute of limitations has not begun to run because his complaint alleges a "continuing tort violation."

The United States is immune from suit except to the extent that, and subject to the express conditions under which, it consents to waive such immunity. *See Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). The Federal Tort Claims Act, 28 U.S.C. § 1346(b), § 2671, *et seq.*, is one such limited waiver of immunity, which must be strictly construed. *See United States v. Sherwood*, 312 U.S. 584, 590-91 (1941). Congress, in granting a waiver of sovereign immunity, may define the exact conditions of such waiver. *See Honda v. Clark*, 386 U.S. 484, 501 (1967). Under the Federal Tort Claims Act, a party has two years within which to file a claim

for a tort against the federal government. According to 28 U.S.C. § 2401(b), "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. . . ." Hoskins discovered his termite problem in September 1994, but did not file a claim against the Department of Defense until April 1997. He claims that the statute should be tolled because he did not know that the federal government was involved in the termite problem. In support of his argument, Plaintiff cites *Gould v. U.S. Dep't of Health & Human Servs.*, 884 F.2d 785 (4th Cir. 1989), for the proposition that the limitations clock did begin to run until he became aware of the involvement of the federal government. This argument fails on two counts. First, *Gould* was overruled specifically with regard to the ruling upon which Hoskins relies in *Gould v. U.S. Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990) (en banc), with the majority opinion written by the dissenting judge in the first *Gould* opinion.[1] Second, Defendant has provided articles from the New Orleans Times-Picayune as early as 1993, which reflect the fact that it was publicly known that Formosan termites came into the country on U.S. military boats after World War II and/or the Korea War. *See* Government Exh. E (including, for example, Iris Kelso, *Invasion of the Formosan Termites*, New Orleans Times-Picayune, May 6, 1993, at B7).

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1. The first *Gould* opinion, holding that a lack of knowledge about a defendant's status as a federal employee tolled the statute of limitations, also appears to have been an aberration in light of the numerous other circuit court decisions to the contrary. *See, e.g., Zeleznik v. United States*, 770 F.2d 20 (3d Cir. 1985) (holding that parents' ignorance regarding the involvement of the INS in the release of the man who killed their son did not toll the running of the two-year statute of limitations) (citing *United States v. Kubrik*, 444 U.S. 111 (1979)).

Therefore, even if Plaintiff did not know about the government's involvement at the time the exterminator came to his house, a simple trip to the public library to learn more about Formosan termites would have revealed the link to the federal government. Plaintiff failed to satisfy his responsibility to undertake a reasonable investigation of his claims and not to sleep on his rights.

The only cases where there has been any leniency with regard to the FTCA statute of limitations have been in cases of wrongful death[2] — tolling the statute of limitations until the date of death, rather than the discovery of the harm that will lead to death — and the continuing medical treatment doctrine[3] — reflecting the policy in favor of encouraging individuals to continue receiving medical care, rather than breaking off treatment to commence a lawsuit. Otherwise, the Fifth Circuit and this Court specifically have acknowledged that the waiver of immunity provided for in the FTCA must be strictly construed. *See Wilkerson v. United States*, 67 F.3d 112, 118 (5th Cir. 1995); *Daniels v. Johnson Controls World Servs., Inc.*, 1994 WL 495862 (E.D. La. 1994). The only claim that upon first glance might seem to escape the statute of limitations difficulty is the negligent failure to warn, because that course of conduct continued beyond the discovery of the Government's involvement in allowing the critters to be brought into the country. However, the continuing tort theory is inapplicable to a cause of action

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2. *See Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996).

3. *See Page v. United States*, 729 F.2d 818, 822-23 & n.36 (D.C. Cir. 1984); *Kossick v. United States*, 330 F.2d 933, 936 (2d Cir. 1964); *but see Ashley v. United States*, 413 U.S. 490, 493 (9th Cir. 1969).

for negligent failure to warn. *See Castano v. American Tobacco Co.*, 870 F. Supp. 1425 (E.D. La. 1994) (Heebe, J.) (citing *GHR Energy Corp. v. Carboline Co.*, 744 F.Supp. 1405, 1407 (E.D. La. 1990) (Mentz, J.)). Therefore, because the statute of limitations has expired with regard to Plaintiff's claims of negligence against the government, those causes of action must be DISMISSED WITH PREJUDICE.

The Government also correctly argues that its limited waiver of immunity does not extend to claims of intentional toil or sustain strict liability. The FTCA only confers jurisdiction on federal courts to hear matters pertaining to "the negligent or wrongful act or omission of any employee of the government. . . ." 28 U.S.C. § 1346(b). The Supreme Court and the Fifth Circuit have ruled that there can be no claim of strict liability against the federal government. *See Laird v. Nelms*, 406 U.S. 797, 803 (1972) ("[T]he [FTCA] did not authorize the imposition of strict liability of any sort upon the government.") (citing *Daleheite v. United States*, 346 U.S. 15 (1953)); *Lathers v. Penguin Indus., Inc.*, 687 F.2d 69, 72 (5th Cir. 1982) ("the language of the FTCA has been interpreted as precluding liability of the United States based on strict liability") (internal citations omitted). This would also preclude any claim of strict liability against the federal government based on the allegation that its actions that led to the introduction of the Formosan termites into the county were unreasonably dangerous per se.

Plaintiff also alleges that the Government committed an intentional tort of deceit by knowingly importing "things" infected with Formosan termites into the United States, and by deliberately and intentionally spreading the termites to

vulnerable areas of the United States. *See* Plaintiff's Amended Complaint at ¶ 17, Third Supplement and Amendment to Complaint at ¶ 24. However, the FTCA specifically states that "[t]he provisions of this chapter and § 1346 (b) of this title shall not apply to . . . (h) . . . any claims arising out of . . . deceit. . . ." 28 U.S.C. § 2680(h). *See also Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975) (noting that it is the substance, rather than the language, of the complaint that determines whether it alleges negligence or an intentional tort). Therefore, Plaintiff's claims sounding in strict liability and intentional tort are precluded by the FTCA and are hereby DISMISSED WITH PREJUDICE.[4]

The Government seeks to dismiss any claims brought by Mrs. Hoskins or the potential members of a class asserting claims against the Government for failure to exhaust administrative remedies. Exhaustion of administrative remedies is an absolute prerequisite to the maintenance of an action under the FTCA. *See* 28 U.S.C. § 2675;[5] *Molinar*

4. Certain claims for deceit or misrepresentation have been found to "arise out of" negligence, and therefore are not prohibited under the FTCA. *See, e.g., Beech v. United States*, 345 F.2d 872, 874 (5th Cir. 1965) The Court's sense is that Plaintiff's intentional tort allegation is more aptly characterized as a claim of this nature. However, as the Court has already explained above, Plaintiff's claims based on negligence fail because the statute of limitations has already run.

5. 28 U.S.C. § 2675(a) states:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss

(Cont'd)

v. United States, 515 F.2d 246, 249 (5th Cir. 1975). Only Mr. Hoskins has filed any type of administrative claim with regard to property damages, and his claims were filed beyond the outer limit of the statute of limitations period, as discussed *supra*. The record demonstrates that Mrs. Hoskins has not pursued any administrative remedies. As she found out about her termite problem in 1994 as well, the window within which she could do so has passed. Because there are currently no other named members of the purported class, there are no other parties who have claims ripe for adjudication by this Court. A class action may be brought under the FTCA only if each claimant has individually satisfied the jurisdictional prerequisites for maintaining a suit under the FTCA. *See Founding Church of Scientology of Washington, D.C., Inc. v. Director, Fed. Bureau of Investigation*, 459 F. Supp. 748, 755 (D.D.C. 1978) (citing *inter alia Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977); *Caidin v. United States*,

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(Cont'd)

> of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

564 F.2d 284 (9th Cir. 1977); *Commonwealth of Pa. v. National Ass'n of Flood Ins.*, 520 F.2d 11 (3d Cir. 1975)). Therefore, because Mr. and Mrs. Hoskins are the lead plaintiffs in this case, and since both of their claims fail, this case should not be sustained based on what might happen with as-yet-to-be-determined plaintiffs.[6]

With regard to Plaintiff's claim of breach of fiduciary duty, Plaintiff has provided no support for the argument that the federal government has a "fiduciary duty" to its citizens, let alone any cases where the Government was found to have breached such a duty. Plaintiff alleges that "[a]s the government of these people, the US owed them a fiduciary

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6. Plaintiff has argued that the exhaustion requirement of the FTCA may not apply because some class members may have suffered harm prior to the enactment of the 1966 Amendment to the FTCA. Mr. and Mrs. Hoskins discovered their harm in 1994 and failed to exhaust their remedies within the appropriate amount of time. There is no indication that there are potential plaintiffs who may have learned of Formosan termite damage prior to 1966. Even if there were, their claims would still be subject to the two-year statute of limitations of the FTCA, which existed prior to the 1966 Amendments, and their claims would now be stale. Therefore, potential plaintiffs with claims accruing prior to 1966 are now time-barred from proceeding, and potential plaintiffs with claims accruing after 1966 are required to exhaust their remedies. However, under neither scenario can Mr. Hoskins attempt to create a class including his wife and him. His claim clearly accrued after 1996, which now fails due to the statute of limitations. Her claim accrued on the same date, and fails for lack of exhaustion. Again, the Court reiterates that every member of the class attempting to bring a claim under the FTCA must have individually satisfied the jurisdictional prerequisites for maintaining a suit. *See Founding Church of Scientology of Washington, D.C., Inc.*, 459 F. Supp. at 754-55.

duty. As a fiduciary to these people, the US owed them a continuing duty of full disclosure of this insidious risk, which duty reoccurred every day until plaintiffs learned of this risk from other sources." *See* Plaintiff's Complaint at ¶ 10. However, upon reading Plaintiff's "breach of fiduciary duty" count, it seems clear that this allegation is simply a restatement of negligent failure of duty to warn. Therefore, for the reasons expressed *supra*, this count is also DISMISSED WITH PREJUDICE.

Although the State of Louisiana has not yet answered the Complaint,[7] the Court questions whether it may retain jurisdiction over the remainder of this dispute, which seeks money damages from the State of Louisiana, in light of the Eleventh Amendment to the United States Constitution prohibiting such suits in federal court. Plaintiff shall brief this issue for the Court by March 12, 2001, at 5:00 p.m.

Considering the fact that this Court may not have jurisdiction over this case for much longer, and the fact that the only party who objected to Plaintiff's request for additional time to certify a class in this case is no longer in this lawsuit, there is no reason to accelerate any determination with regard class certification. Therefore, Plaintiff's Motion asking for additional time to address issues of class certification (Rec. Doc. 22) is hereby GRANTED.

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7. A preliminary default judgment was entered against the State of Louisiana on January 31, 2001 (Rec. Doc. 25).

Appendix

New Orleans, Louisiana, this 20 day of February, 2001.

s/ Helen G. Berrigan
HELEN G. BERRIGAN,
UNITED STATES DISTRICT JUDGE